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No. 89-1582

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CONNECTICUT, DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

A provision of the Hatch Act, 5 U.S.C. 1502(a)(3), bars a state employee who works in a program receiving federal funds from being a candidate for partisan elective office. The question presented is whether that provision violates the First, Fifth or Tenth Amendment of the Constitution.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1A-3A) is unreported. The opinion of the district court (Pet. App. 4A-21A) is reported at 718 F. Supp. 125. The final decisions of the Merit Systems Protection Board (Pet. App. 34A-38A, 55A-60A) are reported at 33 M.S.P.R. 565 and 36 M.S.P.R. 71, and the Board's orders directing the withholding of federal funding (Pet. App. 39A-45A, 61A-67A) are reported

at 35 M.S.P.R. 170 and 36 M.S.P.R. 692. The recommended decisions of the administrative law judge (Pet. App. 22A-33A, 46A-54A) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990, and the petition for a writ of certiorari was filed on April 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners challenge the constitutionality of the Hatch Act's restrictions on the political activities of certain state employees. The Hatch Act consists of two sets of statutory restrictions on the political activities of public employees. The first applies to federal employees. 5 U.S.C. 7321 *et seq.* The second set, at issue here, applies to employees of state and local agencies that receive federal loans or grants. 5 U.S.C. 1501 *et seq.*[1]

The specific subsection of the Hatch Act involved in this case is 5 U.S.C. 1502(a)(3), which provides that a state or local officer or employee "may not * * * be a candidate for elective office."[2] This pro-

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[1] The Hatch Act applies to a "State or local officer or employee," which is defined to mean an individual employed by a state or local agency "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4).

[2] There is an exception permitting a state or local employee to be a candidate in a non-partisan election. See 5 U.S.C. 1503. That exception is inapplicable here.

hibition is much narrower than the predecessor provision that was enacted by Congress in 1940 and sustained by this Court in *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127 (1947), and the provisions that were again sustained in 1973 in *Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). At the time of its enactment and of this Court's decisions, the Hatch Act prohibited employees of state agencies receiving federal funds from "tak[ing] any active part in political management or in political campaigns." Act of Aug. 2, 1939, 53 Stat. 1147, § 12(a), as added by the Act of July 19, 1940, ch. 640, § 4, 54 Stat. 767; see 5 U.S.C. 1502(a)(3) (1970). That earlier version barred a much broader range of political activity, including active campaigning for other candidates in partisan elections and participation in the internal affairs of a political party. See *CSC* v. *Letter Carriers*, 413 U.S. at 578 n.21, 581-595; *Oklahoma* v. *CSC*, 330 U.S. at 144 & n.22. Congress eliminated these additional prohibitions in 1974 [3] in order to "allow[] State and local government employees to participate in political campaign activities" and to "open up the political process to greater numbers of people." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 155 (1974).[4] By contrast, there has been no narrowing

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[3] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 401(a), 88 Stat. 1290.

[4] The Hatch Act also prohibits a state or local officer or employee in a federally funded activity from (1) using his official authority or influence to interfere with or affect the result of a nomination for or election to office, or (2) directly or indirectly coercing or advising another such officer or employee to contribute or lend anything of value to a party, committee or person for political purposes. 5 U.S.C.

of the Hatch Act's corresponding prohibition against federal employees' taking "an active part in political management or in political campaigns." 5 U.S.C. 7324(a)(2).[5]

1502(a)(1) and (2). These additional prohibitions, which have remained unchanged since the Hatch Act was passed, are not at issue here.

[5] Congress recently passed a bill, H.R. 20, 101st Cong., 1st Sess. (1989), that would have narrowed the Hatch Act's restrictions on federal employees as well. 136 Cong. Rec. S5977-S5979 (daily ed. May 10, 1990); *id.* at H3437-H3449, H3471-H3472 (daily ed. June 12, 1990). On June 15, 1990, the President, pursuant to Article I, Section 7, Clause 2 of the Constitution, vetoed H.R. 20. 136 Cong. Rec. H3681-H3682 (daily ed. June 18, 1990). The House repassed the bill over the President's veto on June 20, 1990, *id.* at H3845-H3846 (daily ed. June 20, 1990), but the Senate, on June 21, 1990, failed to repass the bill by the requisite two-thirds majority, *id.* at S8450 (daily ed. June 21, 1990).

As passed by Congress and presented to the President, H.R. 20 would not have made any changes in the prohibitions applicable to state and local employees. Moreover, it would have retained for federal employees the prohibition, at issue in this case, against running for office in a partisan campaign. See proposed 5 U.S.C. 7323(a)(3) (a federal employee may not "run for the nomination or as a candidate for election to a partisan political office"), 136 Cong. Rec. H3437 (daily ed. June 12, 1990). The version of H.R. 20 that was originally passed by the House of Representatives would have allowed federal employees to run for office; it also would have permitted a federal employee to go on leave without pay for that purpose, although it would have prohibited an agency from imposing a leave-without-pay requirement unless the employee's campaign activities interfered with his official duties. H.R. Rep. No. 27, 101st Cong., 1st Sess. 26, 47 (1989); 135 Cong. Rec. H1240, H1267-H1268 (daily ed. Apr. 17, 1989). By contrast, the version of H.R. 20 subsequently passed by the Senate retained the prohibition against a federal employ-

The Hatch Act directs the Special Counsel of the Merit Systems Protection Board (MSPB) to investigate alleged violations by state and local employees and present charges to the MSPB. After a hearing, in which both the employee and the state or local agency may participate, the MSPB must determine whether there has been a violation and whether the violation warrants removal of the employee from his position. 5 U.S.C. 1504, 1505. If the MSPB finds a violation and concludes that removal is warranted, but the employee is not removed within 30 days, the MSPB must order the appropriate federal agency to withhold from the state or local agency an amount of federal grants or loans equal to two years' pay for the employee, and the federal agency must withhold that amount. 5 U.S.C. 1506.

2. a. Petitioner Camillieri began working for petitioner Connecticut Department of Human Resources (DHR) in 1979. In 1983, when Camillieri held the position of Human Resources Chief of Social Work Services in DHR, he was elected to the Hartford City Council. In January 1985, Camillieri was reassigned within the DHR to the position of Acting Chief of the Fair Hearing Unit, where his duties consisted in part of training and supervising hearing examiners who reviewed appeals by individuals who applied to participate in federally funded programs. Pet. App. 7A.

On May 31, 1985, the MSPB's Office of Special Counsel (OSC) informed Camillieri by letter that the Hatch Act prohibited him from seeking reelection to the city council if he remained in his position with DHR. It also warned him that seeking reelection

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ee's running for office, and the House accepted the Senate version.

would be considered a willful violation of the Hatch Act, which could lead to removal from his position. Camillieri nevertheless ran for reelection while remaining on active duty as Acting Chief of the Fair Hearing Unit. Camillieri was defeated in the Democratic primary. Pet. App. 8A, 23A.

In March 1986, the Special Counsel filed a complaint with the MSPB pursuant to 5 U.S.C. 1206(e)(1)(B) and 1504, charging Camillieri with a violation of 5 U.S.C. 1502(a)(3). Pet. App. 25A. DHR participated in the proceedings, as permitted by 5 U.S.C. 1505. The administrative law judge (ALJ) rejected DHR's argument that a state employee should not be penalized if his candidacy is permissible under state law, reasoning that "[i]t would be anomalous to find that the specific language of 5 U.S.C. § 1502(a)(3), forbidding a covered employee's candidacy in a partisan election, could be defeated by a state law or regulation requiring less." Pet. App. 27A-28A. Turning next to DHR's constitutional arguments, the ALJ found that, although couched as an "as applied" challenge, "the tenor of DHR's arguments do not disguise that agency's direct attack on the constitutionality of the Hatch Act," which was beyond the authority of the MSPB to adjudicate. *Id.* at 28A. Finally, the ALJ concluded that removal was an appropriate penalty, inasmuch as Camillieri's violation was substantial, willful, and knowing. *Id.* at 30A-31A.

The MSPB adopted the ALJ's recommended decision and ordered DHR to remove Camillieri from his position. Pet. App. 34A-37A. The MSPB also warned DHR that if it failed to remove Camillieri within 30 days, the MSPB would order the appropriate federal agency to withhold from DHR loans and grants equal to two years' pay for Camillieri.

Id. at 36A n.5. After DHR informed OSC that it would not remove Camillieri, the MSPB ordered the Department of Health and Human Services to withhold federal funds from DHR in the amount of $90,150, the equivalent of two years' pay for Camillieri. *Id.* at 8A-9A, 39A-40A.

b. Petitioner Winkleman was principally employed throughout 1986 as Human Resource Development Senior Representative with DHR. Pet. App. 47a. In that position, Winkleman reviewed and evaluated the management and effectiveness of community and social service programs supported in large part by federal funds. In July 1986, having been endorsed by the Republican Party as a candidate for Probate Judge, Winkleman asked DHR's Personnel Division whether his candidacy might violate the Hatch Act. The Personnel Division sought advice from OSC, which urged Winkleman to withdraw from the race and subsequently sent him a warning letter about his candidacy. Winkleman nevertheless ran for office while remaining an employee of DHR. He was defeated in the general election. *Id.* at 47A-48A.

Thereafter, the Special Counsel filed a complaint with the MSPB charging Winkleman with a violation of 5 U.S.C. 1502(a)(3). The ALJ found that Winkleman's violation was clear and serious, and accordingly recommended that Winkleman be removed from his position. Pet. App. 46A-54A.

The MSPB adopted the ALJ's recommended decision. Pet. App. 55A-60A. It rejected as legally irrelevant Winkleman's contention that there was no evidence that Winkleman abused his state position, because proof of such abuse is not an element of a violation. *Id.* at 57A. The MSPB also rejected Winkleman's argument that under *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985),

the State would be required to hold a hearing prior to terminating him, and that such a hearing would be a sham because the removal decision would already have been made. Observing that this argument "borders on the frivolous," the MSPB pointed out that 5 U.S.C. 1505 afforded Winkleman a right to be heard before the MSPB, and "[n]either *Loudermill* nor the Hatch Act can be interpreted as requiring that the State or local agency conduct a second hearing on the issue of termination if the Board finds that removal of the offending employee is warranted." Pet. App. 57A. The MSPB therefore ordered that Winkleman be removed from his position with DHR and stated that federal funds equalling Winkleman's pay for two years would be withheld if Winkleman was not terminated within 30 days. *Id.* at 58A & n.3. After DHR informed OSC that it would not remove Winkleman, the MSPB ordered the Department of Health and Human Services to withhold $60,896 from DHR. *Id.* at 61A-67A.

3. Pursuant to 5 U.S.C. 1508, petitioners then filed this action for review of the MSPB orders in the United States District Court for the District of Connecticut. The district court granted summary judgment in favor of the MSPB. Pet. App. 4A-21A. It sustained the MSPB's determinations that Camillieri and Winkleman were covered by the Hatch Act; that they had willfully violated the Act (especially since they had received warnings that the Act prohibited their candidacies); and that their violations therefore warranted removal. *Id.* at 18A-20A.

The court also rejected petitioners' constitutional objections. Pet. App. 11A-18A. First, it concluded that the "clear consequence" of this Court's decisions in *United Public Workers* v. *Mitchell*, *Oklahoma* v. *CSC*, *CSC* v. *Letter Carriers* and *Broadrick* v. *Okla-*

homo "is that infringements upon the ability of government employees, be they federal or state, to be candidates for elective office do not violate the First Amendment." Pet. App. 16A. Second, the court concluded that *Oklahoma* v. *CSC* required rejection of petitioners' Tenth Amendment claim that the Hatch Act impermissibly interferes with state sovereignty, and indeed the court noted that petitioners "appear to concede as much." Pet. App. 16A. The court also pointed out that 5 U.S.C. 1502(a)(3) has been amended since the decision in *Oklahoma* v. *CSC* in a manner that renders it "less restrictive" and therefore presents "even less of a claim for a Tenth Amendment violation than the argument rejected by the Supreme Court in *Oklahoma*." Pet. App. 16A-17A.

Finally, the district court rejected petitioners' argument that the Hatch Act denies Camillieri and Winkleman equal protection of the laws because it allows certain other state and local officers and employees[6] to be candidates for office in a partisan campaign. Pet. App. 17A-18A. The court noted that *Broadrick* v. *Oklahoma* had rejected a similar equal protection objection to a state statute that barred employees in the "classified" but not the "unclassified" civil service from engaging in political activities, 413 U.S. at 607 n.5, and it could see "no reason why the distinctions between Camillieri and Winkleman on the one hand, and the kinds of state employees not covered on the other hand, are not within the leeway envisaged by *Broadrick*." Pet. App. 18A.

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[6] The Governor or Lieutenant Governor of the State, the mayor of a city, individuals holding public office, state employees outside the executive branch, and individuals employed by certain educational and research institutions. See 5 U.S.C. 1501(2), 1501(4)(B) and 1502(c).

4. The court of appeals affirmed in a brief unpublished order, Pet. App. 1A-3A, relying on the "well-stated reasons" given by the district court. *Id.* at 3A. Like the district court, the court of appeals recognized that it was not free to disregard this Court's "definitive rulings" in *United Public Workers* v. *Mitchell*, *Oklahoma* v. *CSC*, and *CSC* v. *Letter Carriers* that the Hatch Act does not violate the First or Tenth Amendment, or the Court's holding in *Broadrick* v. *Oklahoma* that a similar limitation on the coverage of such a prohibition does not deny covered employees equal protection of the laws. *Id.* at 3A.

ARGUMENT

Petitioners do not challenge the MSPB's determinations that Camillieri and Winkleman committed willful violations of the Hatch Act and that their violations warranted removal from their positions under 5 U.S.C. 1505(2). Petitioners do contend that the MSPB's orders violate the First and Tenth Amendments and deny Camillieri and Winkleman the equal protection of the laws. The court of appeals correctly rejected those contentions, and those rulings do not conflict with any decision of this Court or another court of appeals.

Indeed, as petitioners concede, this case is controlled by the Court's rejection of essentially identical claims in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *Oklahoma* v. *CSC*, 330 U.S. 127 (1947); *CSC* v. *Letter Carriers*, 413 U.S. 548 (1973); and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).[7]

[7] Petitioners say (Pet. 10 n.10) they are challenging the Hatch Act only as applied in the circumstances of this case. Nothing in their legal position is so limited, however, since they make no argument addressed to their particular circum-

Recognizing the obstacles posed by these decisions, petitioners ask the Court to reconsider them. The Court has stated, however, that "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). Petitioners do not, and cannot, offer any such special justification here. To the contrary, the Court has reaffirmed those First Amendment and equal protection rulings in the specific context of a prohibition against a public official's running for office in *Clements* v. *Fashing*, 457 U.S. 957 (1982), and it has expressly reaffirmed the Tenth Amendment analysis of *Oklahoma* v. *CSC* in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The petition for a writ of certiorari therefore should be denied.

1. In *United Public Workers* v. *Mitchell*, the Court rejected the argument that the Hatch Act's prohibition against "taking an active part in political management and political campaigns" violates the First Amendment rights of federal employees, holding that "Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action." 330 U.S. at 102. The Court explained (*id.* at 103):

> When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the

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stances. Indeed, the fact that petitioners are asking the Court to reconsider governing legal principles confirms that they are making a facial challenge to the Act.

> answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

In *Oklahoma* v. *CSC*, decided the same day, the Court held that the decision in *United Public Workers* v. *Mitchell* required rejection of a First Amendment challenge to the identical Hatch Act provision applicable to state employees. 330 U.S. at 142.

This Court "unhesitatingly reaffirm[ed]" *United Public Workers* v. *Mitchell* in *CSC* v. *Letter Carriers*, 413 U.S. at 556. There, the Court recognized that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" 413 U.S. at 564 (quoting *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968)). The Court therefore held that "[a]lthough Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act." 413 U.S. at 564. And of particular significance here, the Court also specifically stated that an Act of Congress forbidding such activities as "becoming a candidate for, or campaigning for, an elective public office" would "unquestionably be valid." *Id.* at 556.

Petitioners ask this Court to reconsider these decisions in light of more recent precedents that have applied "strict scrutiny" in resolving certain First Amendment and equal protection claims. See Pet. 11-12 (citing *Tashjian* v. *Republican Party*, 479 U.S. 208, 217 (1986); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256

(1986); and *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)). None of those decisions, however, concerned public employees. In recent cases involving the First Amendment rights of public employees, the Court has continued to use the *Pickering* balancing test. See *Rankin* v. *McPherson*, 483 U.S. 378, 383-384 (1987); *Connick* v. *Myers*, 461 U.S. 138, 140 (1983).[8] Petitioners have offered no good reason why that approach should be abandoned here.

Moreover, this case involves only a prohibition against a public official's becoming a candidate for office in a partisan election while retaining his position. Since the Court rendered the decisions in *Letter Carriers* and *Broadrick*, it has *unanimously* sustained such a prohibition in *Clements* v. *Fashing*, 457 U.S. 957, 972 (1982); *id.* at 990 n.12 (Brennan, J., dissenting). Further review of petitioners' First Amendment challenge to the essentially identical provision here is therefore not warranted.[9]

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[8] In *Rutan* v. *Republican Party of Illinois*, No. 88-1872 (June 21, 1990), the Court dealt with decisions by a governmental employer to hire, transfer, promote, or recall employees on the basis of the employees' political affiliations, and held that the First Amendment protects against discrimination among employees or applicants for employment on that basis. But the Court was careful to distinguish its treatment of such political patronage practices from instances where (as in the Hatch Act) the government "takes measures to ensure the proper functioning of its internal operations." Slip op. 7 n.4; see also *id.* at 6-11 & n.3 (Scalia, J., with Rehnquist, C.J., and O'Connor & Kennedy, J.J., dissenting).

[9] Petitioners do not articulate the basis for their equal protection objection, which they mention only in passing (Pet. 11). They do pose the rhetorical question (Pet. 12): "Why should state employees have less ability to fully participate in the political process, on their own time, than all other mem-

2. Petitioners also argue (Pet. 13-16) that the Hatch Act provisions at issue here impermissibly intrude into the internal affairs of the State, in violation of the Tenth Amendment. Petitioners concede (Pet. 14) that this Court's decision in *Oklahoma* v. *CSC* "determines that the Hatch Act does not violate the Tenth Amendment," but they ask (Pet. 15) that that decision be reconsidered because it was rendered before *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); and *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Moreover, in view of the holding

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bers of society?" The assumptions underlying this question are wrong. First, the Hatch Act does not apply to all state employees. As previously noted, the Act applies only to individuals "employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4). Second, the restrictions on federal employees are greater than those on state employees. See pages 3-4 and note 5, *supra*; *Bauers* v. *Cornett*, 865 F.2d 1517, 1523 (8th Cir. 1989).

Moreover, in *Broadrick*, the Court upheld a state statute similar to the Hatch Act against an equal protection challenge based on the fact that it applied to employees in the "classified" service but not the "unclassified" service. 413 U.S. at 607 n.5. Similarly, in *Clements* v. *Fashing*, the majority rejected a similar equal protection challenge to state constitutional provisions that limited the eligibility of certain public officials to run for office. 457 U.S. at 966-971; *id.* at 973-976 (Stevens, J., concurring in part and concurring in the judgment). The limitations and exemptions in the Hatch Act, cited by the district court, Pet. App. 17A-18A (see page 9 and note 6, *supra*), are clearly valid under these equal protection rulings.

in *Garcia* (that the Tenth Amendment does not prohibit application of the Fair Labor Standards Act to a public mass-transit authority), petitioners "are also asking this Court to seriously consider whether its determination in *Garcia* be limited or overruled." Pet. 15. All of the intervening decisions upon which petitioners rely, however, involved direct regulation of governmental activities through statutes enacted by Congress under the Commerce Clause, Art. I, § 8, Cl. 3. The provisions of the Hatch Act at issue here (and in *Oklahoma* v. *CSC*), by contrast, were enacted pursuant to Congress's distinct power to spend money to "provide for the * * * general Welfare of the United States," Art. I, § 8, Cl. 1.

In *Oklahoma* v. *CSC*, the Court explained that "[w]hile the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have the power to fix the terms upon which its money allotments to the states shall be disbursed." 330 U.S. at 143. In sustaining the Hatch Act's restrictions on the political activities of state employees in federally funded programs, the Court continued (*ibid.*):

> The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid.

The Court's conclusion in *Oklahoma* v. *CSC* that the Hatch Act does not violate the Tenth Amendment is entirely consistent with this Court's most recent Spending Clause case, *South Dakota* v. *Dole*, 483

U.S. 203 (1987), which petitioners do not even cite. Indeed, *South Dakota* v. *Dole* discusses with approval and follows the Tenth Amendment analysis of *Oklahoma* v. *CSC*. See 483 U.S. at 206-207, 210; accord *id.* at 212, 217 (O'Connor, J., dissenting). In light of the Court's recent and unanimous reaffirmation of *Oklahoma* v. *CSC*, there is no reason for the Court to reconsider it here. That is especially so because Congress has narrowed the relevant Hatch Act provision since *Oklahoma* v. *CSC* was decided. As the district court pointed out, "the amended [Section] 1502(a)(3) (prohibiting 'be[ing] a candidate for elective office') is less restrictive than the old provision (prohibiting 'tak[ing] an active part in political management or in political campaigns'), and therefore presents even less of a claim for a Tenth Amendment violation than the argument rejected by the Supreme Court in *Oklahoma*." Pet. App. 16A-17A.

This conclusion is buttressed by the carefully tailored nature of the remedy imposed under the Hatch Act in this case. Once the MSPB found that Camillieri and Winkleman had committed willful violations of the Act that warranted their removal, DHR had two options: it could comply with the MSPB's order by removing the two willful violators, or it could face the withholding of federal funds in an amount equal to two years' salary for those violators. DHR chose the latter course, which resulted in the withholding of approximately $150,000 in federal financial assistance. That was a "relatively small percentage" of the federal financial assistance DHR received (compare *South Dakota* v. *Dole*, 483 U.S. at 211), which, in 1986, totalled approximately $60 million. Pet. App. 47a. This limited consequence

does not impermissibly intrude upon the State's sovereignty.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners also contend (Pet. 14 n.12) that *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 432 (1985), requires that the individual employees be afforded hearings before they are removed from their positions and that it would be difficult for a State to complete that process within 30 days of a decision by the MSPB. Thus, petitioners assert that the State would be confronted with the dilemma of either losing federal funds or violating the employees' due process rights. This argument is meritless. If we assume that the individual employees have a protected interest in their jobs, all that *Loudermill* requires is that they be given some kind of a hearing prior to termination. Under the Hatch Act, petitioners had a right to a hearing before the MSPB, 5 U.S.C. 1505, and they have not challenged the constitutional adequacy of that hearing. Nothing in *Loudermill* suggests that the State would be required to hold a second hearing prior to removing the individual employees from their positions on the basis of the MSPB's decision.

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